IN APPEAL.

OBADIAH AYLWIN,
Appellant,

&

AUSTIN CUVILLIER,
Respondent.

RESPONDENT'S CASE.

IN APPEAL.

PROVINCE OF LOWER CANADA, } **IN APPEAL.**

OBADIAH AYLWIN, **Appellant,**

&

AUSTIN CUVILLIER, **Respondent.**

RESPONDENT'S CASE.

THE Action in the Court of King's Bench at Montreal, was instituted by the Appellant to obtain from the Respondent the sum of £272 4 9, the amount of a Judgment alledged to have been obtained by Messrs. Joseph Jones & John White in the Court of King's Bench at Quebec, against Thomas Aylwin, John Harkness and the Respondent, as copartners trading at Quebec, under the Firm of Aylwin, Harkness & Company, on the 20th February 1807. and afterwards assigned over by the said Jones & White to the Appellant by act passed before Voyer and another Notaries, on the 29th of July 1813, with interest, and £20 1 10 costs included in the assignment.

To this Demande the Respondent, on the 16th of February last, answered by his Defences and Exceptions Peremptoires, 1° That the allegations of the Declaration were unfounded and untrue in fact and in law.

2° That the assignment, set forth in the Appellant's declaration, had not been served, *signifié*, upon the Respondent prior to the commencement of the action.

3° That the pretended Judgment of the 20th February 1807, in the Appellant's declaration mentioned, was null and void in so much as related to the Respondent,—

1st. Because the Respondent had never been summoned to appear in the cause in which that Judgment was alledged to have been rendered.

2dly. Because, at the time of the service of process in that cause upon Thomas Aylwin, on the 10th of February 1807, at Quebec, the said Austin Cuvillier, Thomas Aylwin & John Harkness were not copartners.

3dly. Because the service of Process, so made upon Thomas Aylwin, could not be a legal service of process upon the Respondent.

4thly. Because, as early as the 14th of October 1806, the partnership before that time existing between the said Cuvillier, Aylwin & Harkness, had been dissolved.

5thly. Because, upon the 10th February 1807, the Respondent was at the city of Montreal and not at Quebec.

4° That the Appellant had not given or paid any consideration for the said assignment of the 29th July 1813.

5° That the consideration for obtaining that assignment had been paid by Thomas Aylwin by collusion with the appellant, in order to defraud the respondent.

6° That the appellant had no interest in the recovery of the sums by him demanded in this cause.

7° That the sum paid by Thomas Aylwin, as a consideration for the said assignment, was only £50 currency.

147795

RES
HC
23
1790 TS

It is to be observed that by a mere clerical error in the respondent's exception and defences, the Judgment is expressed to have been obtained, and the assignment to have been made by *John* Jones and Thomas White, whereas Joseph Jones & Thomas White are intended to be named, but those instruments are otherwise sufficiently designated *the Judgment and Assignment mentioned in the Appellant's Declaration.*

Furthermore the appellant, by traversing material facts, stated in the respondent's exception, has admitted their applicability to the Judgment and Assignment, upon which his action was founded. This he did by his replication, in which he alleges that the said Thomas Aylwin, John Harkness and the Respondent Austin Cuvillier were, at the time of service of Process in the said cause, wherein Judgment was rendered against them, *as mentioned in the Declaration,* copartners, at Quebec, there trading under the Name and Firm of Aylwin, Harkness & Company, and that the said Partnership was not dissolved on the 14th October 1806, nor at any time before the rendering of the said Judgment.

It was upon the appellant's own motion, (No. 26 of the Record) that the parties were, on the 6th April last, ordered, without any preliminary hearing, to proceed to the adduction of proof upon the issue raised by the pleadings upon the respondent's exceptions and defences.

The Respondent proved by witnesses, heard in Court, that from the year 1805 to the time of taking the Enquête, he had been constantly resident and domiciliated at the city of Montreal.

Every partnership between Cuvillier, Aylwin & Harkness was also proved by the defendant's exhibit, No. 18 of the Record, to have been dissolved on the 14th October 1816.

It was incumbent on the respondent to establish the remaining matters of exception, which he had pleaded, and this the respondent has done by submitting to the appellant certain Interrogatories on Faits & Articles, which were duly served upon him at Boston in the United States of America, in virtue of a Commission in the nature of a Commission Rogatoire, but to which the appellant having neglected to answer, they were afterwards taken against him pro confesso.

These Faits & Articles establish :

1° That during the year 1807 and during the month of February of that year, the respondent actually resided at the city of Montreal.—(4th Interogatory.)

2° That the assignment of 29th of July 1813, was made in consideration of £50.—(5th Interrogatory.)

3° That prior to the assignment, several sums of money had been paid by Thomas Aylwin unto Jones & White, on account of the Judgment stated in the declaration.—(6th Interrogatory.)

4° That the said assignment had been made to the appellant for the use of Thomas Aylwin.—(7th Interrogatory.)

5° That the sums paid as a consideration for the assignment were the monies of Thomas Aylwin.—(8th Interrogatory.)

6° That the sums paid as such consideration, were not of the appellant's monies or property, that the appellant has no interest in recovering the money by him demanded, and that Thomas Aylwin was the only person having such interest.—(9th Interrogatory.)

7° That the appellant is uncle of Thomas Aylwin.—(11th Interrogatory.)

8° That the money mentioned in the assignment, has been paid by Thomas Aylwin unto Messrs. Jones & White.—(12th Interrogatory.)

10° That the appellant's name is made use of in the assignment at the request of Thomas Aylwin.—(14th Interrogatory.)

11° That the appellant does not consider himself as liable to pay the costs of suit in the Court below, if the action be dismissed; but that Thomas Aylwin has given him to understand he himself would pay the costs.—(17th Interrogatory.)

The perusal of this uncontradicted evidence carries such a conviction of fraud as could leave no doubt in the minds of the Court below and the appellant's action was, on the 19th of June last, finally dismissed with costs.

From this Judgment, however, the present Appeal has been brought, and the reasons assigned are reducible to two, vizt.

1° That the Court below have erroneously admitted the Respondent's Exceptions and ordered proof thereon.

2° That the Appellant's Conclusions ought in Law to have been awarded unto him.

The Respondent's Answers are of course General.

QUEBEC, 12th November, 1816.